IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

MISC.CIVIL APPLICATION NO.79 OF 2004

Prabhakar Harischandra Patil,
Indian Inhabitant, aged 63 years,
residing at Block No.1, Sumati Niwas,
Plot No.93, Aarey Road, Goregaon
(East), Mumbai 400 063. .... Applicant.

Versus.

Arvind Harischandra Patil,
Indian Inhabitant, aged 56 years,
residing in a Room Block No.1,
Sumati Niwas, Plot No.93, Aarey
Road, Goregaon (East), Mumbai 400063. .... Respondent.

Shri S.G.Deshmukh for the Applicant.

Shri S.V.Oak for the Respondent.

CORAM : ABHAY S. OKA, J.

Date on which
Judgment reseved : 2nd September 2004.

Date on which
Judgment pronounced : 21st October, 2004.

JUDGMENT.

1. This application is filed by the Respondent in the First Appeal who was the original Plaintiff. This Application is filed under sections 151 and 152 of the Code of Civil Procedure, 1908 praying for modification of the Judgment and Decree passed by this Court in the First Appeal. The application has been opposed by the Respondent by filing affidavit-in-reply.

2. The Applicant filed S.C.Suit No.6858 of 1993 against the Respondent for declaration that the Respondent and his family members are not entitled to use the hall, W.C., bath room, kitchen and gallery of Block No.1, Sumati Nivas, Plot No.93, Aarey Road, Goregaon (West), Mumbai and for permanent injunction restraining the Respondent from using the hall and the gallery of the said block No.1 and for restraining use of the W.C., bath and kitchen for a period more than for half an hour in the morning and half an hour in the evening. A prayer for mandatory injunction was also incorporated in the suit. The said suit was contested by the Respondent by filing written statement. The Respondent is the real brother of the Applicant. The trial Court partly decreed the suit filed by the Applicant on 24th October 1997. The operative part of the decree passed by the trial Court reads thus:

> "Suit is hereby partly decreed as under:
>
> (i) It is hereby declared that the defendant and his family have no right to use hall and gallery of Block No.1 in the suit building and to cause inconvenience to the plaintiff and his family members in

its user.

(ii) Defendant and his family members are restrained by perpetual injunction by using the said hall and the gallery in the said Block for any purpose whatsoever except egress and ingress i.e. entry through gallery.

(iii) Defendant is directed to remove his articles if any from the hall and the gallery within eight weeks from the date of this judgment. No declaration or injunction is granted in respect of W.C., bath room, and kitchen or the double room in Part II of the suit premises."

The said decree passed by the trial Court was impugned by the Respondent by preferring First Appeal No.275 of 1998. The First Appeal was dismissed by this Court by the Judgment and Order dated 15th July 2003.

3. The case of the Applicant is based on the Will dated 8th July 1973 executed by his late father Harischandra Gopal Patil. The said Will has been probated and the

Applicant is the executor appointed under the Will. As per the said Will, the building Sumati Nivas was divided into two parts. The first part consisting of three blocks on one side and three double rooms bearing Nos.2, 3 and 4. The second part consisted of 9 double rooms bearing Nos.1 and 5 to 12. The second part 2 was given under the said Will to the Respondent and the First Part was given to the Appellant subject to right of residence to the Respondent in one rear room on the ground floor in block No.1. As per the said Will the said Block No.1 was bequeathed to the Appellant. The Will gave a personal right to the Respondent of residence in one room on the rear side in Block No.1. The will provided that the sanitary block and the kitchen in block No.1 will be used in common by the Appellant and the Respondent. The right given to the Respondent under the said Will to use the rear room in Block No.1 was a personal right and he was not entitled to create third party interests in respect of the said rear room. The trial Court held that the Respondent has failed to establish that under the will he and his family members are entitled to use the hall of block No.1. The trial Court recorded a clear finding that the hall in block No.1 was given exclusively to the Applicant and the right of common user is given to the Respondent only in respect of sanitary block and kitchen in Block No.1.

The learned trial Judge also held that there is no reference in the will that the gallery in the block No.1 was kept common.

4. This Court dismissed the Appeal preferred by the Respondent and the Decree passed by the trial Court has been confirmed.

5. Shri Deshmukh, the learned Counsel appearing for the Applicant submitted that the trial Court as well as this Court have recorded a clear finding that the hall in the block is given exclusively to the Applicant. Similar finding has been recorded in respect of the gallery also. The learned Counsel submitted that clause 2 of the operative part of the Decree of the trial Court is interpreted by the Respondent to mean that he has a right to enter through the hall in Block No.1 for using the sanitary block and the kitchen. The Applicant has relied upon a sketch of Block No.1 annexed to the application. Shri Deshmukh submitted that a clarification/modification is required to be made to the effect that the Respondent is not entitled to enter the hall as for approaching the rear room, the Respondent has direct access from the gallary and he can enter the toilet block and kitchen from the rear room.

6. Shri S.V.Oak, the learned Counsel appearing for the Respondent opposed the application. He submitted that no modification was required to be made. He submitted that the application should have been made in the trial Court and not in this Court. He submitted that as per the finding recorded by the trial Court as well by this Court, the Respondent is entitled to use the hall and the gallery for egress and ingress. He, therefore, prayed for dismissal of the application.

7. I have considered the rival submissions. In the affidavit-in-reply, the Respondent has not specifically disputed the correctness of the sketch of the block No.1 which is annexed to the Application. From the sketch it is clear that the Respondent is required to enter the gallery in the Block No.1 for the purpose of entering the rear room. From the rear room the Respondent has direct access to the toilet block and the kitchen.

8. In paragraph 3 of the judgment, the trial Court has held as under:

> "A careful scrutiny of the recitals on the third and fourth page of the Will Exh.A clearly shows that the right of common user is given to the Defendant only in respect of

> sanitary block in the kitchen. The Will does not bear reference to the hall and it is, therefore, obvious that the hall forms part of the rest of the premises namely block No.1 which was given exclusively to the Plaintiff. There is similarly no reference with regard to the gallery also."

This Court while dismissing the appeal held as under:

> "The right of common user is given to the defendant only in respect of sanitary block and the kitchen. The Will does not refer to the hall and it is therefore obvious that the hall forms part of rest of the premises viz. block No.1 which was given exclusively to the plaintiff. There is similarly no reference with regard to the gallery also."

Thus the trial Court as well as this Court has recorded a clear finding that the Respondent has no right in respect of the hall and the gallary which exclusively belongs to the Applicant.

9. In paragraph 15 of the Judgment, the trial Court has dealt with extensively the contentions raised by the

Respondent that the hall in block No.1 is being jointly used by the Applicant and the Respondent as per the desire expressed by the testator. The learned trial Judge held after considering the oral evidence of the Respondent as under:

> "His evidence in para 5 that the hall is being used jointly as per desire expressed in the Will does not bear any support from the Will itself, as there is no such provision in the Will. He himself has denied having kept any article in the Hall or the gallery. It is obvious that he has no right to do so. Taking the evidence and the material on record and taking the recitals in the Will of their father into account, I have no difficulty in coming to the conclusion that the Defendant has no right to use the hall at all and if there is any articles in the hall or in the gallery, the same will have to be removed."

In clause 2 of the operative part of the decree the trial Court has clearly restrained the Respondent and his family members by a decree of perpetual injunction from using the hall and gallery in block No.1 for any

purpose whatsoever except egress and ingress through the gallery. After having read the judgment of the trial Court as well as the judgment of this Court, it is very clear that it was never intended to grant any access to the Respondent through the hall for approaching the sanitary block and kitchen as the Respondent can always enter the common sanitary block and kitchen through the rear room which is admittedly in his possession and he can enter the said rear room through the gallery in block No.1. Therefore by clause 2 of the operative part of the decree, the trial Court has granted perpetual injunction restraining the Respondent and his family members from using the hall and the gallery in block No.1 for any purpose whatsoever with qualification that the Respondent will have right of egress and ingress to the rear room through gallery in block No.1. There is obviously an accidental slip in clause 2 of the operative part of the Judgment due to which one may get an impression that the right of egress and ingress is granted through gallery as well as through the hall. The operative part of the Judgment has to be consistent with the findings recorded in the Judgment and therefore, it is obvious that the accidental slip in clause 2 will have to be corrected.

10. The controversy raised by the learned Counsel for

the Respondent is whether this Court can exercise power under section 152 of the Code, which reads thus:

> "152. Amendment of judgments, decrees or orders. - Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties."

The appeal preferred by the Respondents against the decree passed by the trial Court was not dismissed by this Court by exercising power under Rule 11 of Order XLI of the said Code and the said appeal was heard finally. Therefore, as held by this Court in the Judgment reported in AIR 1953, Bombay, page 122 (Hussain Sab v/s. Sitaram Vighneshwar), even if the decree or judgment of the trial Court is to be corrected by exercising power under section 152 of the Code, this Court being the first Appellate Court can exercise the said power as there is a merger of the decree of the trial Court with the decree of this Court. This Court in the said Judgment held as under:

> "If a decree of confirmation is passed by the appellate Court, the decree of the trial Court merges in the decree of the appellate Court, and it is impossible to say that the decree of the trial Court is still in existence and it could be amended. The decree which is in existence and which can be executed is the decree of the appellate Court, and not the decree of the trial Court. The fact that the appellate court does not vary the decree of the trial Court does not make any difference to the legal position that ultimately it is the decree of the appellate Court which is the substantive decree and which must be amended if an amendment is sought."

Therefore, the Application is maintainable in this Court.

11. One of the objections raised by the learned Counsel for the Respondent was that the application styled as Miscellaneous Civil Application is misconceived. The said objection is too technical in nature. The Applicant could have filed an application styled as

Civil Application which in any event could have came up before this Court. Therefore, there is no substance in the said objection.

12. Hence the following order:

(i) The Application is allowed.

(ii) The Clause No.(ii) of the operative part of the Judgment and Order of the trial Court which has been confirmed by this Court will now read as under:

. "The Defendant and his family members are restrained by a perpetual injunction from using the said hall and the gallery in the said Block for any purpose whatsoever. However, the Defendant and his family members shall be entitled to use the gallery in block No.1 only for the purpose of egress and ingress to the rear room which is in possession of the Defendant."

(iii) Consequential amendment be carried out to the clause No.(ii) of the operative part of the decree passed in the said suit accordingly.

(iv) There will be no order as to costs.

Judge.